Supreme Court, U.S.
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91-1432

No. _____

In The

Supreme Court of the United States

October Term, 1991

LEONA WOODS,

Petitioner,

v.

AT&T INFORMATION SYSTEMS, INC., a corporation; and N.R. MADHOK, individually,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 13, 1992

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QUESTIONS PRESENTED FOR REVIEW

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Does the Tenth Circuit determination that the line of authority in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), a case dealing with the promulgation of administrative regulations, plainly ignore this Court's decision in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974) which sustains the requirement that courts of appeals apply the statutory law in existence at the time of the appellate court ruling?

Did the Tenth Circuit refuse to apply the applicable authority dealing with discovery disputes as set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Int'l Bhd. of Teamsters*, 431 U.S. 324 (1977); and *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977)?

PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

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No. _____

In The

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October Term, 1991

LEONA WOODS,

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v.

AT&T INFORMATION SYSTEMS, INC., a corporation; and N.R. MADHOK, individually,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Leona Woods, respectfully prays that a writ of certiorari be issued to review the December 16, 1991 order and judgment of the United States Court of Appeals for the Tenth Circuit and the February 7, 1992 Order denying the petition for rehearing and suggestion for rehearing en banc.

OPINIONS BELOW

The Order entered on February 7, 1992 denying the petition for rehearing and suggestion for rehearing en

banc reprinted in the appendix hereto. See App. A, 1a – 2a.

The Order and Judgment entered on December 16, 1991 appealed from is reprinted in the appendix hereto. See App. B, 1b – 5b.

The Notice of Appeal filed on February 27, 1990 reprinted in the appendix hereto. See App. C, 1c – 2c.

The Judgment in the civil case number CIV-88-997-A in the United States District Court for the Western District of Oklahoma filed on February 22, 1990 reprinted in the appendix hereto. See App. D, 1d.

The Order entered by the District Court below filed on January 29, 1990 reprinted in the appendix hereto. See App. E, 1e – 11e.

The Order filed on November 22, 1989 reprinted in the appendix hereto. See App. F, 1f – 4f.

The Order filed on September 5, 1989 reprinted in the appendix hereto. See App. G, 1g – 6g.

December 4, 1991 Supplement to Authorities presented by petitioner to the Tenth Circuit reprinted in the appendix hereto. See App. H 1h – 30h.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on December 16, 1991. On December 30, 1991, the petitioner filed an Application for An Extension of Time to File A Petition for Rehearing and the application was granted on December 31, 1991. The

Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed on January 14, 1992. The Tenth Circuit denied rehearing on February 7, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1) (Supp. 1991) which provides that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil case after rendition of judgment.

FEDERAL STATUTES INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Supp. 1991) (hereinafter "Title VII"); and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (Supp. 1991) (hereinafter "ADEA") are involved in this case.

Section 2000e-2 provides, in pertinent part, as follows:

> § 2000e-2. Unlawful employment practices
>
> (a) It shall be an unlawful employment practice for any employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or,
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to

> deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The enforcement provisions for unlawful employment practices are set forth at 42 U.S.C. § 2000e-5 (Supp. 1991).

Section 623 of the ADEA provides, in pertinent part, as follows:

> § 623. Prohibition of age discrimination
>
> It shall be unlawful for an employer –
>
> (1) to. . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . .

The enforcement provisions for § 623 are found at 29 U.S.C. § 626 (Supp. 1991).

The Civil Rights Act of 1991, Act of Nov. 21, 1991, Pub. L. No. 102-166, 1991, U.S.C.A. (Supp. VI, Feb., 1992) (hereinafter "the Act") modifies the above statutory provisions and the decisions of this Court construing such provisions.

Section 3 of the 1991 Act states:

The purposes of this Act are –

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Section 402 (Effective Date) provides:

(a) In General – Except as otherwise specifically provided, this act and the amendments made by this Act shall take effect upon enactment.

(b) Certain Disparate Impact Cases – Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

The Civil Rights Act of 1991 was signed by President George Bush on November 21, 1991. The Act overturns eight decisions of this Court.[1]

Rules 11, 26, 33, 34, and 37 of the Federal Rules of Civil Procedure are also involved in this case.

STATEMENT OF THE CASE

Petitioner's employment by the respondents was terminated in September, 1986. On June 9, 1988, petitioner filed an action against the respondents alleging unlawful discrimination in employment in violation of Title VII and the ADEA. The Title VII action was tried to the district court. On or around February 21, 1990, the court

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[1] *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Section 101 of the Act addresses the scope of 42 U.S.C. § 1981); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (Sections 104 and 105 of the Act address the standards applicable to a disparate impact case); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Section 107 of the Act addresses the remedies in a mixed motive case); *Martin v. Wilks*, 490 U.S. 755 (1989) (Section 108 addresses the permissibility of a collateral challenge to affirmative action provisions in court orders and decrees); *EEOC v. Aramco*, 111 S.Ct. 1227 (1991) (Section 109 addresses the applicability of Title VII to American citizens employed outside the United States by American firms); *Lorrance v. AT&T*, 490 U.S. 900 (1989) (Section 112 addresses the statute of limitations applicable to particular claims against seniority systems); *West Virginia Univ. Hospitals v. Casey*, 111 S.Ct. 1130 (1991) (Section 113 addresses the recovery of expert witness fees by a prevailing party); *Library of Congress v. Shaw*, 108 S.Ct. 1965 (1988) (Section 114 addresses awards of attorney fees in an action against the federal government).

ruled in favor of respondents on petitioner's sex discrimination claim. The ADEA action was tried to the jury and a judgment in favor of the respondents was entered on February 22, 1990.

A notice of appeal was filed on February 27, 1990. Petitioner filed her brief in chief on August 7, 1990 and amended brief in chief on or around October 18, 1990 wherein the application of the Civil Rights Act of 1990 to the instant case was raised by petitioner. On December 9, 1991, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, petitioner filed the following supplement to the authorities contained in her Brief in Chief, Section III at pages 39-50 and Reply Brief, Section III at pages 22-25:

> Civil Rights Act of 1991, Pub. L. No. 102166. S. 1745, 102nd Cong., 1st Sess. CONG. REC. 15273-15277 (October 25, 1991) passed by the Senate on October 30, 1991 and the House of Representatives on November 7, 1991. President George Bush [signed (sic)] the bill on November 21, 1991.

App. H, 1h.

On December 16, 1991, the United States Court of Appeals, Tenth Circuit held:

> Finally, Appellant asserts that the proposed Civil Rights Act of 1990 requires us to set aside the judgment below so that the Act's burden of proof provisions may be applied to her case. We need not address this argument. The Act never became law.

App. B, 5b.

A Petition for Rehearing and Suggestion for Rehearing En Banc was filed on January 14, 1992 by Petitioner. The Tenth Circuit denied the petition for rehearing by the panel that rendered the decision. App. A.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit ignored the distinction between cases dealing with administrative regulations and procedures and further ignores the fact that *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974) is plain, unambiguous, and directly instructive regarding what law is to be applied at the time that the appellate court rules.

Additionally, should this Court find that there are two distinct lines of authority as set forth by this Court dealing with retroactivity which are equally applicable, then this Court should grant the writ to instruct the appellate and trial courts.

Finally, the importance of granting the writ to clearly show the necessity of basing a ruling of law on the statutory law in question can no better be appropriately justified than by the 27 year debate in Congress regarding the necessity of expanding or supplementing the parameters of the civil rights afforded our citizens. The Tenth Circuit again refused to follow the controlling law, albeit case law, in its approval of the resolution of discovery disputes and evidentiary matters.

The overwhelming and overriding importance of the protections provided by the 1991 Act cries out for the

application of the statutory law reflected in The Civil Rights Act of 1991, Act of Nov. 21, 1991, Pub. L. No. 102-166, 1991, U.S.C.A. (Supp. VI, Feb., 1992) in existence at the time of the Tenth Circuit ruling.

CONCLUSION

The granting of this Petition for a Writ of Certiorari will provide guidance to appellate courts and trial courts regarding the applicability of the existing statutory and case law on pending non-final litigation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEONA WOODS, Plaintiff-Appellant,	)	
v.	)	No. 90-6090
AT&T INFORMATION SYSTEMS, INC., a corporation; N.R. MADHOK, individually, Defendants-Appellees.	)	

ORDER
Entered February 7, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and WINDER,* District Judge.

---

*Honorable David K. Winder, of the United States District Court for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc, and appellees' response thereto.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the Suggestion for rehearing en banc is denied.

Judge Holloway did not participate in consideration of the petition.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

Ms. Marilyn Dyda Barringer
4901 Richmond Square
Suite 104
Oklahoma City, OK 73118

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEONA WOODS, Plaintiff-Appellant, v. AT&T INFORMATION SYSTEMS, INC., a corporation; N. R. MADHOK, individually, Defendants-Appellees.	)	No. 90-6090 (D.C. No. CIV-88-997-A) (W.D. Okla.)

ORDER AND JUDGMENT[1]
(Filed Dec. 16, 1991)

Before McKAY, Chief Judge, LOGAN, Circuit Judge, and WINDER[2], District Judge.

Appellant Leona Woods appeals several pretrial and trial rulings made by the district court during the course

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[2] Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

of Appellant's sex and age discrimination suit. We have reviewed Appellant's arguments and find them unpersuasive.

Appellant challenges the district court's denial of her motion seeking enforcement of a court order compelling discovery ("motion to enforce"). Appellant and her counsel also challenge the district court's assessment of attorney's fees and Rule 11 sanctions against Appellant's counsel in connection with that motion. In addition, Appellant claims the district court erred in denying her motion to amend her witness list and in excluding proposed expert testimony at trial. Finally, Appellant contends the Civil Rights Act proposed by Congress in 1990 requires us to set aside the judgment below so that certain provisions of the proposed legislation can be used to establish the respective burdens of proof in her case.

Appellant brought suit against Appellees AT&T Information Systems, Inc., and N.R. Madhok claiming age and sex discrimination with respect to her former employment with AT&T. During the discovery phase of the litigation, the district court ordered Appellees to respond to certain discovery requests. Appellees complied with the order. Appellant's counsel deemed the response insufficient. Instead of conferring with Appellees' counsel as required by Local Rule 14(E), however, Appellant's counsel filed a motion seeking enforcement of the court order. The district court found that a Local Rule 14(E) conference would have obviated, in large part, the need for the motion to enforce and, thus, concluded the motion was unjustified. Accordingly, the district court denied the motion and awarded Appellees attorney's fees

as prevailing parties pursuant to Rule 37(a)(4). Appellant's counsel was ordered to pay these fees personally.

The district court further found that Appellant's motion to enforce contained unfounded accusations of deliberate misconduct on the part of Appellees or their counsel. Accordingly, the district court concluded that Appellant's counsel had violated Rule 11 by signing and filing a pleading containing statements unsupported by fact. The district court sanctioned Appellant's counsel with a written admonishment and sent notice of the sanction to other judges sitting in the Western District of Oklahoma.

Appellant claims the district court erred in denying her motion to enforce. Appellant apparently hinges her argument on the unfounded contention that because certain recordkeeping regulations promulgated by the Equal Employment Opportunity Commission require Appellees to maintain some of the information sought, the district court was required to grant the motion. We find this unsupported argument meritless.

Appellant also contends the district court failed to assess the sufficiency of Appellees' discovery response before denying Appellant's motion to enforce. The record simply does not support, however, the conclusion that the district court failed to evaluate the sufficiency of Appellees' response. In any event, the district court's denial of Appellant's motion was based on the failure of Appellant's counsel to comply with Local Rule 14(E) and not on the sufficiency of Appellees' response. Appellant asserts

compliance with 14(E) would have been futile and, therefore, was not required. This assumption is likewise unsupported by the record.

The district court has broad discretion to the control of discovery, and rulings will not be set aside short of an abuse of discretion. *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir. 1984). We are satisfied the district court acted within its discretion in determining Appellant's motion to enforce was unjustified. Thus, we affirm the district court's ruling. Accordingly, we also affirm the district court's award of attorney's fees to Appellees pursuant to Rule 37(a)(4).

Appellant further asserts the district court erred in refusing her leave to amend her witness list. Appellant apparently claims the need for the amendment stemmed directly from Appellees' insufficient discovery response and from the district court's denial of her motion to enforce. In light of our affirmance of the district court's denial of the motion to enforce, we find this contention meritless and affirm.

We likewise affirm the district court's imposition of a Rule 11 sanction in this case. We apply an abuse of discretion standard to all aspects of the district court's Rule 11 determination. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2454 (1990). We conclude that the decision to sanction Appellant's counsel was within the district court's discretion. This is especially true in light of the leniency of the sanction.

Appellant also claims the district court erred in excluding the proposed expert testimony of Dr. Skoog at trial. The district court excluded Dr. Skoog's proposed

testimony after determining the testimony would be unhelpful to the jury. The decision to admit or exclude evidence is within the sound discretion of the district court and reviewable only for an abuse of discretion. *Boren v. Sable*, 887 F.2d 1032, 1033 (10th Cir. 1989). We affirm the exclusion of Dr. Skoog's testimony as a proper exercise of the district court's discretion.

Finally, Appellant asserts that the proposed Civil Rights Act of 1990 requires us to set aside the judgment below so that the Act's burden of proof provisions may be applied to her case. We need not address this argument. The Act never became law.

We have thoroughly reviewed the briefs and the record and find no error. therefore, we AFFIRM.

Entered for the Court

Monroe G. McKay
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LEONA WOODS, Plaintiff,	)	
vs.	)	Case No. CIV-88-997-A
AT&T INFORMATION SYSTEMS, INC., a corporation, and N. R. MADHOK, individually, Defendants.	)	

NOTICE OF APPEAL

(Filed Feb. 27, 1990)

Notice is hereby given that the Plaintiff Leona Woods and her counsel Marilyn D. Barringer, appeal to the United States Court of Appeals for the Tenth Circuit from the February 22, 1990 judgment entered in favor of the Defendants and against the Plaintiff, and all other judgments and orders entered by the Trial Court against the Plaintiff in this case, and specifically the Trial Court's Order filed on January 29, 1990 assessing attorneys fees for failure to comply with Rule 14(E) of the Local Court Rules for the United States District Court for the Western District of Oklahoma and imposing a sanction against

counsel for the plaintiff pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Marilyn D. Barringer
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Oklahoma City, OK 73118
(405) 840-3101

Counsel for the Plaintiff

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of February, 1990, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid to:

Thomas J. Enis, Attorney
Margaret McMorrow-Love, Attorney
Fellers, Snider, Blankenship, Bailey & Tippins, P.C.
2400 First National Center
Oklahoma City, OK 73102

Counsel for the Defendants

/s/ Marilyn D. Barringer
Marilyn D. Barringer

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF DISTRICT

LEONA WOODS

V.

AT&T INFORMATION SYSTEMS, INC., a corporation, and N. R. MADHOK, individually

JUDGMENT IN A CIVIL CASE

(Filed Feb. 22, 1990)

CASE NUMBER: CIV-88-997-A

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of defendants AT&T Information Systems, Inc. and N. R. Madhok and against the plaintiff, Leona Woods.

February 22, 1990
Date

ROBERT D. DENNIS
Clerk

/s/ Artesia Pennethy
(By) Deputy Clerk
Artesia Pennethy

ENTERED ON JUDGMENT DOCKET 2-22-90

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEONA WOODS, Plaintiff, v. AT&T INFORMATION SYSTEMS, INC., a corporation, and N.R. MADHOK, an individual, Defendants.	)	No. CIV-88-997-A

ORDER

(Filed Jan. 29, 1990)

Before the Court is Plaintiff's Brief In Objection, Request For Review And Appeal of Magistrate's December 12, 1989, Findings Of Fact And Recommendations. Additionally, the Court has considered the defendants' response to plaintiff's objection to the magistrate's findings and recommendations.

I. PROCEDURAL HISTORY

The Court notes the following procedural history relevant to this Order:

A) On October 16, 1989, Plaintiff's Motion For The Court To Enforce Order Granting Plaintiff's Motion To Compel Discovery [more properly described as a motion for "more complete discovery" in light of defendants' prior production] And Brief In Objection

To Defendants' Motion in Limine And Request For Leave To Supplement The Same Plaintiff's Motion To Compel Discovery was filed herein.

B) On October 24, 1989, Defendants' Response To Plaintiff's Motion To Enforce Court Order was filed, Defendants argued that plaintiff's motion should be denied, and additionally requested that the Court set for hearing a request for attorneys fees (in defending plaintiff's motion) on grounds that plaintiff's motion was not filed in compliance with Local Rule 14(e), and that it contained serious accusations against defendants and their counsel which were unsupported in fact.

C) On November 22, 1989, this Court entered its Order denying plaintiff's motion to enforce court order compelling discovery, and ruling in part on defendants' motion in limine. Additionally, two items were referred to the U.S. Magistrate for hearing – first, Part C of defendants' motion in limine; and second, defendants' application for attorney fees for failure to observe Rule 14(e), and for unfounded ad hominem accusations.

D) After a hearing on these matters, on December 12, 1989, Magistrate Cauthron filed her Order and Report and Recommendation as requested by the Court. Part C of the Motion in Limine of defendants was denied as premature. (No objection to this order of the magistrate is raised in plaintiff's objection). As to defendants' request for attorney fees, the magistrate made certain findings of fact which are hereinafter set forth (Order and Report and

Recommendations, p. 3-8) solely for purposes of clarity in the record.

E) The magistrates findings were as follows:

Findings of Fact

14(E) Conference

1. On September 5, 1989, the District Court granted plaintiff's motion to compel and required defendants to produce documents and answer an interrogatory within 15 days from that date. By agreement, this time was expanded to require responses by October 2, 1989.

2. Plaintiff's counsel's inspection of the documents actually commenced on September 20, 1989, and concluded on October 4, 1989.

3. On October 16, 1989, included with her response to defendants' motion in limine, plaintiff submitted a Motion for the Court to Enforce Order Granting Plaintiff's Motion to Compel Discovery, in which she asserted that defendants' response to requests for production and interrogatory as ordered by the Court on September 5, 1989, was incomplete in certain particulars. No allegation of or actual compliance with Local Rule 14(E) existed at that time.

4. Local Rule 14(E) requires a personal meeting and conference in good faith with opposing counsel prior to the filing of "all motions or objections relating to discovery pursuant to Rules 26 through 37, Federal Rules of Civil Procedure. . . . " This rule applies in both letter and spirit to plaintiff's motion to enforce court order.

5. On October 24, 1989, defendants responded in objection to plaintiff's motion to enforce court order, in which response they pointed out plaintiff's counsel's failure to allege or attempt compliance with Local Rule 14(E). One day previously, apparently prompted by an order of the Court commenting on plaintiff's counsel's failure to comply with a different provision of Local Rule 14, plaintiff's counsel filed an amendment to the motion to enforce court order setting out reasons why the 14(E) conference should be excused. This pleading offers the press of time and impending deadlines in this case and states that plaintiff's counsel did not have sufficient time to compile and compare the information obtained from document production and to delineate objections to the defendants' discovery responses with sufficient specificity to conduct a personal meeting. Although not asserted in this amendment, plaintiff's counsel stated at the hearing that she had not believed Local Rule 14(E) to be applicable to her motion to enforce court order.

6. Although plaintiff's motion to enforce court order has been denied by the District Court, counsel for defendants have supplemented and expanded their original discovery responses to respond to the concerns raised by plaintiff in the motion and in subsequent letters.

7. As demonstrated by letters between counsel (plaintiff's hearing exhibits 10, 11, 12, and 13), most, if not all of the concerns and problems raised by plaintiff have been resolved by agreement. A 14(E) conference prior to the filing of the motion to enforce court order would have, at least in large part, obviated the need for such a motion.

8. Plaintiff's motion to enforce court order cannot be treated as an allegation that defendants failed to comply with the Court's earlier order compelling discovery, pursuant to Fed.R.Civ.P. 37(b), as defendants did respond to the discovery requests. It is rather in the nature of a motion to compel more complete discovery, pursuant to Rule 37(a). An award of attorneys' fees to defendants, as prevailing parties, is appropriate.

9. Fed.R.Civ.P. 37(a)(4) mandates the award of expenses, including attorneys' fees, to a prevailing party in a discovery motion where the filing of the motion was not substantially justified unless the existence of other circumstances makes such an award unjust. Defendants prevailed on plaintiffs' motion to enforce court order and the motion was, in fact, a motion to compel more complete answers to interrogatory and requests for production. The only reason offered by plaintiff's counsel for the absence of a good faith conference was lack of time, but because such a conference would have obviated much, if not all, of the need for the motion to enforce order, plaintiff's filing of the motion without such a conference was not substantially justified.

10. Defendants' attorneys' fees in connection with resisting the motion to enforce court order are slightly in excess of $500; their request is for $500; plaintiff's counsel does not dispute the reasonableness of this amount; and the undersigned finds $500 to be a reasonable and necessary attorneys' fee for resisting plaintiff's motion.

Unfounded Ad Hominem Accusations

1. In plaintiff's motion to enforce court order, statements are made which defendants' counsel interpret to be personal accusations that counsel and/or the corporate defendant deliberately withheld documents and/or removed documents from personnel files. With respect to these accusations, as well as the 14(E) conference, defense counsel stated at the hearing that defendants' request for attorneys' fees is far less important than a judicial acknowledgment that such accusations are unfounded and, in fact, are not true.

2. The accusations in plaintiff's Motion for the Court to Enforce Order Granting Plaintiff's Motion to Compel Discovery are as follows:

> Defense counsel continues to engage in this game even though the Court has compelled it to comply with the discovery code and underlying substantive law. (p. 3)
>
> Therefore, only one conclusion can be drawn from this difference when combined with defense counsel's statement that the information was obtained from a review of the personnel files. AT&T has not produced all documents contained in the individual personnel files. (p. 5)
>
> . . . Defendants' continuous failure to produce data properly discoverable and to comply with the Court's Order compelling discovery. (p. 9)
>
> . . . only to find that such files are incomplete and the defendants' answers to interrogatory 5 is also incomplete. Clearly, defendants have engaged in bad faith and dilatory tactics to the

substantial detriment and prejudice of the expeditious resolution of the pending action. (p. 9)

3. While the inference may be drawn from these statements and the entire brief that documents were intentionally removed from personnel files, only the latter of the above-quoted statements can be fairly construed as a direct and personal accusation.

4. Regardless whether one addresses the specific accusations made or the tenor of plaintiff's brief as construed by defendants, plaintiff's counsel can offer no basis in fact for an accusation or wrongdoing on the part of defendants' counsel or defendants, despite her continuing adherence to this belief as expressed at the hearing. In response to specific questions by the undersigned Magistrate, Ms. Barringer responded that she does not know whether it is defendants' counsel or defendants who are deliberately withholding information; nor does she have any evidentiary support for this belief, other than the course of discovery problems.

5. The "evidence" of wrongdoing offered by Ms. Barringer is that she has been unable to get the documents and information she needs in the time and manner she thinks appropriate. This is not evidence of wrongdoing but rather of the difficulty of a solo practitioner in resolving disputed discovery matters, meeting immediate trial deadlines, and responding to motions in a short period of time, as occurred in this case. While certain information provided in response to plaintiff's interrogatory no. 5 was never adequately verified, as required by the Federal Rules of Civil Procedure, both this and other problems raised by plaintiff have been addressed and

responded to by defendants and do not amount to deliberate misconduct on the part of either defense counsel or the corporate defendant. Any resistance to discovery prior to the Court's order of September 5, 1989, is not alleged by plaintiff to be misconduct, and is hereby found to be within the Federal Rules of Civil Procedure. Any omissions occurring after September 5, 1989, have either been unopposed by plaintiff, oversights cured upon notice, or allowed under the rules.

6. Fed.R.Civ.P. 11 allows the imposition of an appropriate sanction for unfounded accusations in pleadings signed by counsel. Plaintiff's accusation that "defendants have engaged in bad faith and dilatory tactics" is an unfounded accusation.

II. ADOPTION OF MAGISTRATE'S FINDINGS

Having reviewed the record herein de novo, the Court finds that the findings of fact made by the magistrate are not clearly erroneous or contrary to law, and the magistrate's findings are accepted in entirety by this Court.[1]

---

[1] Plaintiff's Appeal from the magistrate's findings and recommendation can be fairly characterized as a reargument of issues dealing with plaintiff's desire for "more complete discovery" after defendants have complied with the Court's order compelling production. This Court previously denied plaintiff's request for "more complete discovery," in its Order of November 22, 1989, described in paragraph C) above, and will not reconsider those issues.

III. ATTORNEYS FEES FOR FAILURE TO COMPLY WITH RULE 14 (E)

The Court has reviewed the recommendation of the magistrate with respect to the imposition of attorney fees, and hereby adopts the recommendation. It is the Order of this Court that Ms. Marilyn Barringer, personally, pay to defendants their reasonable attorneys fees in defending the Plaintiff's Motion For Court To Enforce Court Order Granting Plaintiffs' [sic] Motion To Compel Discovery, which amount is $500.00 Ms. Barringer is ordered to report said payment to this Court, in writing, as soon as payment is accomplished.

IV. RULE 11 SANCTIONS FOR UNFOUNDED AD HOMINEM ACCUSATIONS

The Court has reviewed the recommendation of the magistrate with respect to ad hominem accusations found in Plaintiff's Motion For the Court To Enforce Order Granting Plaintiff's Motion To Compel Discovery. It is the Court's order that the following statement be expunged from the record which the Court finds constitutes a direct and personal accusation against defendants, unsubstantiated by plaintiff:

> . . . only to find that such files are incomplete and the defendants' answers to interrogatory 5 is also incomplete. Clearly, defendants have engaged in bad faith and dilatory tactics to the substantial detriment and prejudice of the expeditious resolution of the pending action. (p. 9)

Further, the Court orders expunged from the record the following statements which the Court finds constitute

indirect accusations against defendants and their counsel, unsubstantiated by plaintiff:

> Defense counsel continued to engage in this game even though the Court has compelled it to comply with the discovery code and underlying substantive law. (p. 3)
>
> Therefore, only one conclusion can be drawn from this difference when combined with defense counsel's statement that the information was obtained from a review of the personnel files. AT&T has not produced all documents contained in the individual personnel files. (p. 5)
>
> . . . Defendants' continuous failure to produce data properly discoverable and to comply with the Court's Order compelling discovery. (p. 9)

The use of such unsubstantiated statements by counsel for plaintiff, Ms. Barringer, is considered by this Court to be unprofessional. Professionalism in the practice of law requires civil relations between counsel in the spirit of reason. Such professionalism will be required by this Court. Ms. Barringer is hereby admonished not to make accusations of bad faith and dilatory tactics against defendants' counsel or the corporate defendant that are unfounded in fact, and rest on conjecture.

Conclusion

Ms. Marilyn Barringer, counsel for plaintiff, is personally ordered to pay to defendants their reasonable attorneys' fee in defending the motion to compel court order in the amount of $500.00. Further, Ms. Barringer is to report in writing to the Court the accomplishment of

that payment. Ad hominem accusations, set out specifically above, found in Plaintiff's Motion For The Court To Enforce Order Granting Plaintiff's Motion To Compel Discovery are ordered expunged from the record; and Ms. Barringer is hereby admonished for making such accusations, unfounded in fact.

It is so ordered this 26th day of January, 1990.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEONA WOODS, Plaintiff,	)	No. CIV-88-997-A
v.	)	
A.T. & T. INFORMATION SYSTEMS INC., a corporation, and N. R. MADHOK, individually, Defendants.	)	

ORDER

(Filed Nov. 22, 1989)

Before the Court is the (1) Motion in Limine of Defendants and Request for Leave to Supplement Same, (2) Plaintiff's Motion for Leave to Amend Plaintiff's Exhibit List in Chief, (3) Plaintiff's Motion to Enforce Court Order, and (4) Defendant's Application For Attorney Fees for Failure to Observe Rule 14(E) and for Unfounded Ad Hominem Accusations.

1. Motion in Limine of Defendants and Request for Leave to Supplement Same

Defendants, AT&T Information Systems Inc. ("ATTIS") and N.R. Madhok seek by their motion to restrict and prevent plaintiff from introducing evidence in the trial of this matter in four categories of proposed

testimony. Further, the defendants request leave to supplement their Motion in Limine at such time as the deposition of plaintiff's expert witness, Rawleigh H. Ralls, has been taken and his statistical charts produced.

The Court, having reviewed the brief of the parties makes the following rulings:

(a) As to testimony regarding any alleged acts of misconduct or poor job performance by other Zone Managers of ATTIS during the pertinent time period, including, but not limited to, the testimony of Kay Rhodes, Tom Freeman, or any testimony pertaining to either of those individuals, the defendants' Motion in Limine is denied.

(b) As to records of plaintiff's performance at the Oklahoma City Business Office prior to November of 1985 when defendant, N. R. Madhok, assumed a supervisory position with reference to the operations of that office, the defendants' Motion in Limine is denied.

(c) As to any statistical evidence offered on behalf of plaintiff, including, but not limited to, any testimony or exhibits prepared by Rawleigh H. Ralls, listed as an expert witness for the plaintiff, the Court reserves its ruling pending a hearing before a U.S. Magistrate for recommendation to the Court. This matter has been referred by separate order of even date.

(d) As to any evidence concerning salaries of Level 2 managers, other than the plaintiff, the defendants' Motion in Limine is denied.

(e) As to plaintiff's request for leave to supplement its Motion in Limine at such time as the deposition of plaintiff's expert witness,

Rawleigh H. Ralls, has been taken and his statistical charts produced, plaintiff's request is denied. Item 3 above, referred herein to the magistrate, includes said testimony and statistical charts.

2. Plaintiff's Motion for Leave to Amend Plaintiff's Exhibit List in Chief

The Court, having reviewed the briefs of the parties, rules that Plaintiff's Motion for Leave to Amend Plaintiff's Exhibit List in Chief, is denied.

3. Plaintiff's Motion to Enforce Court Order

The Court, having reviewed the briefs of the parties, rules that Plaintiff's Motion to Enforce Court Order Granting Plaintiff's Motion to Compel Discovery is denied.

4. Defendants' Application for Attorney Fees for Failure to Observe Rule 14(E) and for Unfounded Ad Hominem Accusations

The Court, having reviewed the Defendants' Application and Plaintiff's Amendment to its Motion to Enforce Court Order, has by separate order of even date, referred this matter to the U. S. Magistrate. Request has been made of the magistrate for report and recommendations on Defendants' Application for Attorney Fees for Failure to Observe Local Rule 14(E) and for Unfounded Ad Hominem Accusations. The Court reserves its ruling on said application until such time as it receives the magistrate's report and recommendations.

Conclusion

With respect to Defendants' Motion in Limine and Request for Leave to Supplement Same, said motion and request are denied, except with respect to Item number 3, which is referred to the U. S. Magistrate for hearing. The Plaintiff's Motion for Leave to Amend Plaintiff's Exhibit List in Chief is denied. Plaintiff's Motion to Enforce Court Order is denied. Defendant's Application for Attorney Fees for Failure to Observe Rule 14(E) and for Unfounded Ad Hominem Accusations is referred to the U. S. Magistrate for report and recommendations.

It is so ordered this 22nd day of November, 1989.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LEONA WOODS, Plaintiff,	)	No. CIV-88-997-A
v.	)	
AT&T INFORMATION SYSTEMS, INC., a corporation, and H. R. MADHOK, individually, Defendants.	)	

ORDER

(Filed Sept. 5, 1989)

This matter is before the Court for consideration of the Motion to Compel filed by the Plaintiff, Leona Woods. The plaintiff requests the Court to enter an order directing the defendant AT&T to respond to certain requests for the production of documents and certain interrogatories. The plaintiff also requests the Court to direct counsel for the defendant American Telephone and Telegraph Company to produce various documents referred to during the deposition testimony of certain witnesses.

The disputed request for the production of documents are as follows:

"Request Number 3: A copy of any and all personnel records of American Telephone and Telegraph Company as they pertain to each person so employed by American Telephone and Telegraph Company as a Business Office Manager within the last three years at the

Oklahoma City Consumer Sales and Service Business Office."

"Request Number 4: A copy of any and all personnel records of American Telephone and Telegraph Company as they pertain to each person so employed by American Telephone and Telegraph Company as a Zone Manager, within the last three years."

The disputed interrogatories are as follows:

"Interrogatory Number 5: Please identify and list each zone manager of the defendant from November 1983 to date indicating the job title, age, sex, highest salary, and current status of each employee."

"Interrogatory Number 6: Please identify each supervisor in the table of organization or hierarchy for defendants' zone manager department and indicate the age and sex of each supervisor identified."

"Interrogatory Number 14: Please describe every charge and/or lawsuit brought against defendant alleging age discrimination, sex discrimination, harassment and/or retaliation, indicating for each the form [sic], case, or docket number, status, resolution, and contents, and please identify for each the person bringing the charge and/or lawsuit."

"Interrogatory Number 19: Please state the net worth for defendant American Telephone and Telegraph Company for its last fiscal year."[1]

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[1] The plaintiff's motion and brief are somewhat ambiguous as to the specific interrogatories at issue. In the first paragraph of her brief, the plaintiff states that she seeks an

(Continued on following page)

A review of the record indicates that AT&T has objected to request for production numbers 3 and 4. As to request number 3, AT&T contends that the information sought is not relevant in that the plaintiff was not employed by AT&T after September 1986. AT&T adds that the individuals whose personnel files are requested have a reasonable expectation of privacy and that the plaintiff has not demonstrated any compelling need that would justify the production of these files. As to request number 4, AT&T repeats its relevancy objection as to personnel files after September, 1986, and it adds that all personnel files other than those for employees under the direct supervision of the defendant N. R. Madhok are also not relevant. AT&T again invokes the reasonable expectations of privacy of the subject zone managers.

A review of the record indicates that the plaintiff has modified requests 3 and 4 such that she now seeks the

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(Continued from previous page)

answer to interrogatories 6, 9, 14 and 19. However, in section B-1 of her brief, the plaintiff contends that the defendants should be directed to respond to interrogatories 5, 6, 14 and 19.

The Court has assumed that the disputed interrogatories are numbers 5, 6, 14 and 19. However, if the plaintiff seeks an answer to interrogatory 9, her Motion to Compel is denied as to that interrogatory.

Interrogatory 9 concerns the plaintiff's salary, pay increase, and fringe benefits and the salary increases of zone managers generally. In its response to the interrogatory, AT&T states that the information sought as to the plaintiff is contained in documents that have already been produced. AT&T also states that it does not have specific projections of salary increases of other zone managers. No further response to interrogatory 9 is required.

subject personnel files for the years 1984 through 1986 only. Upon consideration of these modified requests, the Court finds that the documents sought to be relevant under the broad discovery standard. As the plaintiff has noted, information regarding an employer's general employment practices is often relevant to discrimination claims. *See, e.g., Rich v. Martin Marietta Corp.*, 522 F.2d 333, 342-45 (10th Cir. 1975); *EEOC v. University of New Mexico*, 504 F.2d 1296, 1302 (10th Cir. 1974). With regard to the privacy expectations of the employees whose personnel files have been requested, AT&T has cited no authority supporting the proposition that such files are privileged, and, in fact, a number of courts have concluded that such documents are discoverable. *See, e.g., Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, *reh'g denied*, 485 F.2d 687 (5th Cir. 1973); *Orbovich v. McAlester College*, 119 F.R.D. 411 (D. Minn. 1988); *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631 (D. Md. 1978).

Accordingly, the plaintiff's Motion to Compel is granted as to requests for the production of the documents 3 and 4 for the years 1984 through 1986. The defendant AT&T is directed to produce the requested documents no later than 15 days from the date of this order.

With regard to the disputed interrogatories, the Court notes that interrogatory number 5 seeks the same kind of information as request for production number 4. Therefore, as to interrogatory number 5, the Court grants the plaintiff's Motion to Compel for the years 1984 through 1986. The defendant AT&T is directed to respond to interrogatory 5 to this extent no later than 15 days from the date of this order.

With regard to interrogatory number 6, however, AT&T has responded that it does not have a "Zone Manager Department." Accordingly, as to interrogatory number 6, the plaintiff's Motion to Compel a further answer is denied.

However, the Court agrees with the defendant AT&T that interrogatories 14 and 19 are overbroad. Interrogatory 14 is in no way limited to a specific time period, and it seeks information as to documents involving issues not here raised by the plaintiff (i.e. harassment and retaliation). Similarly, interrogatory 19, regarding AT&T's net worth, seeks information not relevant to the kind of damages recoverable in this lawsuit. *See Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-65 (11th Cir. 1982); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871-72 (1st Cir. 1982); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976); *Riddle v. Getty Refining and Marketing Co.*, 460 F.Supp. 678 (N.D. Okla. 1978). Accordingly, as to interrogatories 14 and 19, the plaintiff's Motion to Compel is denied.

Finally, with regard to the plaintiff's request for the production of the documents referred to during deposition testimony, the Court finds that the plaintiff has failed to consider Rule 30(b)(5) of the Federal Rules of Civil procedure. Rule 30(b)(5) provides that request for the production of documents at depositions must be made pursuant to Rule 34 of the Federal Rules of Civil Procedure. Here there is no indication that the plaintiff has complied with Rule 34 with regard to any of the subject documents. Since the deadline for conducting discovery has now passed, no request through Rule 34 can now be made. Accordingly, as to the documents referred to in the

subject deposition testimony, the plaintiff's Motion to Compel is denied.

Therefore, as set forth above, the plaintiff's Motion to Compel is granted in part and denied in part. In light of this disposition, the Court finds that each party shall bear its own costs with regard to this motion. Further, the Court will not reopen or extend discovery in this matter.[2]

It is so ordered this _____ day of September, 1989.

/s/ Ralph Thompson
for WAYNE E. ALLEY
United States
District Judge

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[2] The plaintiff has also filed a Motion to Supplement Her Motion to Compel and a Motion for expedited Hearing of Her Motion to Compel. In light of the disposition of the plaintiff's Motion to Compel set forth above, the Court finds that these two motions are now moot.

APPENDIX H

Marilyn D. Barringer
Attorney at Law

4901 Richmond Square, Suite 100
Oklahoma City, Oklahoma 73118
Phone (405) 840-3101

December 4, 1991

(Filed Dec. 9, 1991)

Robert L. Hoecker, Clerk
U.S. Court of Appeals, 10th Circuit
C404 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294

Re: Leona Woods v. AT&T Information Systems, Inc. et al. ***Case No. 90-6090 USCA Tenth Circuit***

Dear Mr. Hoecker:

Pursuant to Rule 28 (j) of the Federal Rules of Appellate Procedure, Appellant encloses a copy of the Civil Rights Act of 1991, Senate Bill 1745, in supplement to the authorities contained in the Appellate's Brief In Chief, Section III at pages 39-50; and Reply Brief, Section III at pages 22-25:

> Civil Rights Act of 1991, Pub. L. No.102166. S. 1745, 102nd Cong., 1st Sess. CONG. REC. 15273-15277 (October 25, 1991) passed by the Senate on October 30, 1991 and the House of Representatives on November 7, 1991. President George Bush [signed (sic)] the bill on November 21, 1991.

The legislation is offered to assist the Court in the determination of some of the issues raised by the Appellant.

Enclosed are 13 copies. Please file 12 copies and return a stamped "filed" copy to my office in the enclosed self addressed stamped envelop [sic].

Sincerely yours,

/s/ Marilyn D. Barringer
Marilyn D. Barringer

Enclosures
cc: Ms. Margaret McMorrow-Love
Counsel for Appellees

CIVIL RIGHTS ACT OF 1991

Mr. DANFORTH. Mr. President, I call for the regular order.

The PRESIDING OFFICER. The clerk will report S. 1745.

The legislative clerk read as follows:

A bill (S. 1745) to amend the Civil Rights Act of 1964, to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

The Senate proceeded to consider the bill.

AMENDMENT NO. 1274

Mr. DANFORTH. Mr. President, on behalf of myself and Senators KENNEDY, DOLE, MITCHELL, HATCH, THURMOND,

CHAFEE, COHEN, DURENBERGER, HATFIELD, JEFFORDS, SPECTER, DIXON, BOND, DODD, D'AMATO, EXON, DOMENICI, GRAHAM, GARN, GORE, GORTON, LIEBERMAN, KASSEBAUM, PELL, MCCAIN, ROBB, MURKOWSKI, ROTH, RUDMAN, SEYMOUR, SIMPSON, STEVENS, WARNER, and LEAHY. I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislation clerk read as follows:

The Senator from Missouri [MR. DANFORTH], for himself, MR. KENNEDY, MR. DOLE, MR. MITCHELL, MR. HATCH, MR. THURMOND, MR. CHAFEE, MR. COHEN, MR. DURENBERGER, MR. HATFIELD, MR. JEFFORDS, MR. SPECTER, MR. DIXON, MR. BOND, MR. DODD, MR. D'AMATO, MR. EXON, MR. DOMENICI, MR. GRAHAM, MR. GARN, MR. GORE, MR. GORTON, MR. LIEBERMAN, MRS. KASSEBAUM, MR. PELL, MR. MCCAIN, MR. ROBB, MR. MURKOWSKI, MR. ROTH, MR. RUDMAN, MR. SEYMOUR, MR. SIMPSON, MR. STEVENS, MR. WARNER, and MR. LEAHY, proposes an amendment numbered 1274.

Mr. DANFORTH. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that –

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are –

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1939);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 4. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended –

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections;

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.".

SEC. 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY. –

"(1) CIVIL RIGHTS. – In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703 or 704 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statues (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY. – In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 102 of the Act (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT. – In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990, damages may not be awarded under this section

where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES. –

"(1) DETERMINATION OF PUNITIVE DAMAGES. – A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES. – Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS. – The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed –

"(A) in the case of a respondent who has more than 15 and fewer than 101 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, $50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) CONSTRUCTION. – Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL. – If a complaining party seeks compensatory or punitive damages under this section –

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITIONS. – As used in this section:

"(1) COMPLAINING PARTY. – The term 'complaining party' means –

"(A) in the case of a person seeking to bring an action under subsection (a)(1), a person who may bring

an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);

or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), a person who may bring an action or proceeding under title I of the American with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) DISCRIMINATORY PRACTICE. – The term 'discriminatory practice' means the discrimination described in paragraph (1), or the disparate treatment or the violation described in paragraph (2), of subsection (a).

SEC. 6. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting, "1981A" after "1981".

SEC. 7. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.".

SEC. 8. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate's impact is established under this title only if –

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to a [sic] an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative business practice.'

"(2) A demonstration that an employment practice is required by business necessity may not be uses as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

SEC. 9. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 8) is further amended by adding at the end the following new subsection:

"(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment, related tests on the basis of race, color, religion, sex, or national origin.".

SEC. 10. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL. – Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 8 and 9) is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

(b) ENFORCEMENT PROVISIONS. – Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended –

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under this section 703(m) and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

SEC. 11. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 8, 9, and 10 of this Act) is further amended by adding at the end the following new subsection:

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under circumstances described in subparagraph (B).

"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

"(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

"(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to –

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened:

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group

on whose behalf relief was sought in such action by the Federal Government:

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 12. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) DEFINITION OF EMPLOYEE. – Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) EXEMPTION. –

(1) CIVIL RIGHT ACT OF 1964. – Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended –

(A) by inserting "(a)" after "SEC. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on –

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation.".

(2) AMERICANS WITH DISABILITIES ACT OF 1990. – Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended –

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) COVERED ENTITIES IN FOREIGN COUNTRIES. –

"(1) IN GENERAL. – It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) CONTROL OF CORPORATION. –

"(A) PRESUMPTION. – If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) EXCEPTION. – This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) DETERMINATION. – For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

"(i) the interrelation of operations;

"(ii) the common management;

"(iii) the centralized control of labor relations; and

"(iv) the common ownership or financial control. of the employer and the corporation.".

(c) APPLICATION OF AMENDMENTS. – The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 13. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C 2000e-4(h)) is amended –

(1) by inserting "(1)" after "(h)"; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to –

"(A) individuals who historically have been victims of employment discrimination and have not bee equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting

employment discrimination, concerning rights and obligations under this title or such law, as the case may be.".

SEC. 14. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C 2000e-5(e)) is amended –

(1) by inserting "(1)" before "A charge under this section"; and

(2) by adding at the end the following new paragraph;

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 15. AUTHORIZING AWARD OF EXPERT FEES.

(a) REVISED STATUTES. – Section 722 of the Revised Statutes is amended –

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

"(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977a of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.".

(b) CIVIL RIGHTS ACT OF 1964. – Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

SEC. 16. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended –

(1) in subsection (c), by striking "thirty days" and inserting "90 days"; and

(2) in subsection (d), by inserting before the period", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties.".

SEC. 17. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended –

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Sections 6 and" and inserting "Section"; and

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 18. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 19. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE. –

(1) COMMITMENT TO RULE XLII. – The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

"No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof –

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment,

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(2) APPLICATION TO SENATE EMPLOYMENT. – The rights and protections provided pursuant to this Act, the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate.

(3) INVESTIGATION AND ADJUDICATION OF CLAIMS. – All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to Senate Resolution 338, Eighty-eighth Congress, as amended, or such other entity as the Senate may designate.

(4) RIGHTS OF EMPLOYEES. – The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the Acts referred to in paragraph (2).

(5) APPLICABLE REMEDIES. – When assigning remedies to individuals found to have a valid claim under the Acts

referred to in paragraph (2), the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent practicable apply the same remedies applicable to all other employees covered by the Acts referred to paragraph (2). Such remedies shall apply exclusively.

(6) MATTERS OTHER THAN EMPLOYMENT. –

(A) IN GENERAL. – The rights and protections under the Americans with Disabilities Act of 1990 shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) REMEDIES. – The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) PROPOSED REMEDIES AND PROCEDURES. – For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(7) EXERCISE OF RULEMAKING POWER. – Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provision of paragraphs (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full

recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES. –

(1) IN GENERAL. – Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE –

(A) APPLICATION. – The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION. –

(i) IN GENERAL. – In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION. – The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) EXERCISE OF RULEMAKING POWER. – The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS. –

(1) IN GENERAL. – The rights and protections under this Act and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES. – The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS. – The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES. – For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) CONSTRUCTION. – Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 20 ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Act.

SEC. 21. SEVERABILITY

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 22. EFFECTIVE DATE.

(a) IN GENERAL. – Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES. – Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a

complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983.

Mr. DANFORTH. Mr. President, I ask unanimous consent that the attached interpretive memorandum be printed in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

INTERPRETIVE MEMORANDUM

The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove – Business necessity/cumulation/alternative business practice – the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

Mr. DANFORTH. Mr. President, this is a substitute for the civil right bill, and this is the work product that

has been put together after countless hours of negotiations that have involved the minority leader. Senator DOLE, representatives of the White House, particularly Boyden Gray, the Legal Counsel of the White House, Senator KENNEDY, and others.

Mr. President, for nearly 2 years many of us have been attempting to put together a civil rights bill that would redress problems created by the Supreme Court of 1989, particularly a bill that would reinstate the Griggs decision and that would overrule the Wards Cove decision.

This amendment would do that. It has been put together after painstaking negotiations involving a number of people. This morning the President met with Senator DOLE and me, and I can tell the Senate that the President's attitude toward this compromise was one of genuine elation.

We have resolved the problem of legal redress toward discrimination in the work force. We have provided, for the first time, a remedy for women who have been harassed on the job, a remedy of damages, and we have done so in a way that satisfies the administration as not constituting quota legislation. The position that the administration now takes is that this is not a quota bill.

To me, Mr. President, the significance of this compromise is far greater than the wording of the amendment. The significance is that by entering into this compromise, which encompasses the administration and Senator DOLE, Senator MITCHELL, Senator KENNEDY and others, we have taken the race issue out of the political arena, and we have recreated a bipartisan consensus on the issue of civil

rights. If there is any issue before the country that demands a national consensus, it is civil rights. And if there is any issue that should not be one of partisan wrangling, it is civil rights. And for that reason, it is especially gratifying that this compromise has been reached.

There is now no reason why the compromise that has just been introduced will not become law. The only threat really that I see is one of mischief making, namely, that Senators will attempt to offer very popular sounding amendments which would kill the deal. And, of course, the other possibility is that the House of Representative will kill it. But as I understand it, the initial feedback from the House has been good.

It is my hope that the amendment in its present form will be enacted into law. It is my hope that the House will, in turn, vote to agree to this amendment, to the bill as amended by this amendment, and that we will then send it to the President for his signature.

This long ordeal on civil rights is over. We are ready, Mr. President, to reestablish the consensus on civil rights, which is so important to our Nation.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. DOLE. Mr. President, I know the Presiding Officer has other pressing commitments, and I appreciate his willingness to accommodate the Senator from Missouri. I just say, as I will say in more detail on Monday, it certainly is a tribute to the steadfast work of the distinguished Senator from Missouri, Senator DANFORTH. And I

applaud him for bringing nearly all of us together in the U.S. Senate on this very important legislation. It is important legislation.

I think, with the President on board, enthusiastically on board, there is no doubt in my mind that we can probably pass this legislation, hopefully, if not Monday night, sometime Tuesday.

Finally, I just urge my colleagues, particularly on my side of the aisle, that if it is a deal-breaker amendment, it is going to be very difficult for some of us to support it. We want to get a civil rights bill. This is our opportunity. We ought to make the most of it. We ought to send it to the House, hope the House will take the Senate bill, and that it will go to the President within the next couple of weeks.

I thank the Chair.

Supreme Court, U.S.
FILED
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No. 91-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONA WOODS,

Petitioner,

v.

AT&T INFORMATION SYSTEMS, INC., a corporation, and N.R. MADHOK, individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' MEMORANDUM IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioner's contention that the substantive provisions of the Civil Rights Act of 1991 should be applied retroactively to this case where petitioner offered no explanation of how retroactive application could require a new trial on her claims and where these provisions of the new Act could have no effect on any of petitioner's claims?

STATEMENT REQUIRED BY RULE 29.1

AT&T Information Systems, Inc. was at the time the action was filed a wholly-owned subsidiary of American Telephone and Telegraph Co. (AT&T). Since then, AT&T Information Systems, Inc. has been merged into AT&T. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriali Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

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LEONA WOODS,

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AT&T INFORMATION SYSTEMS, INC., a corporation, and N.R. MADHOK, individually,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION

This petition purports to raise—but does not raise—the question whether the substantive provisions of the Civil Rights Act of 1991 are to be applied "retroactively" to cases that were pending on appeal when the statute was enacted. Petitioner asserts that the Tenth Circuit here refused to apply the new Act to vacate the judgment against her because the Tenth Circuit purportedly made a "determination" that the retroactivity issue was controlled by "the line of authority in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)," rather than by "this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), which sustains the requirement that courts of appeals apply the statutory law in existence at the time of the appellate court ruling." (Pet. i).

However, the Tenth Circuit made no such holding. It summarily denied the retroactivity claim in a one-

sentence order that did not address the merits of the retroactivity issue at all. Petitioner had offered no explanation of how the application of the Civil Rights Act of 1991 could require reversal of the trial court's judgment against her. Further, it was, and is, plain that the retroactive application of the new Act could not affect any of petitioner's claims. For these and other reasons, this case is manifestly inappropriate for review by this Court.

STATEMENT OF THE CASE

Petitioner Leona Woods was formerly employed as a Zone Manager for AT&T Information Systems, Inc. ("AT&T"). In 1986, AT&T received information that petitioner was responsible for destroying certain revenue records. After an internal investigation, petitioner was reprimanded for this conduct. Later that year, eight managers who reported to petitioner made serious accusations of mismanagement and misconduct by petitioner. After a further internal investigation, AT&T concluded that petitioner was guilty of numerous violations of the company's code of conduct. Petitioner elected to retire rather than resign or be terminated.

In this case, petitioner claimed that she had been terminated by AT&T because of her sex in violation of Title VII of the Civil Rights Act and because of her age in violation of the Age Discrimination in Employment Act ("ADEA"). Petitioner tried the case on the theory that AT&T had engaged in "disparate treatment" of employees on the basis of age and sex, *not* that AT&T's facially neutral policies had a "disparate impact." At the close of all the evidence, the court dismissed petitioner's Title VII sex discrimination claim. The ADEA claim was then submitted to a jury, which returned a verdict in favor of respondents.

On appeal, petitioner devoted the bulk of her briefs to challenging the district court's decision to impose Rule 11 sanctions on petitioner's counsel and the district

court's resolution of related discovery disputes. (*See* Pet. 3b-5b). In addition, petitioner noted that both the Senate and House had passed bills entitled the Civil Rights Act of 1990. In an unpublished opinion, the Tenth Circuit concluded that the district court did not abuse its discretion in its resolution of the discovery disputes or in its award of sanctions against petitioner's counsel. (Pet. 3b-5b). The court declined to address the relevance of the Civil Rights Act of 1990 because "[t]he Act never became law." (Pet. 5b).

On November 21, 1991, the President signed the Civil Rights Act of 1991 into law. After the court of appeals issued its decision, petitioner filed a petition for rehearing, with suggestion for rehearing en banc. The petition for rehearing was, again, principally devoted to her objections to the discovery rulings and sanctions. However, petitioner also noted that the Civil Rights Act of 1991 had been enacted, and she asserted that rehearing was warranted to decide whether the 1991 Act should be applied retroactively to her sex discrimination and age discrimination claims. Nowhere in the rehearing petition, however, did petitioner explain how the new requirements of the 1991 Act, if applied to her case, could require reversal of the judgment or a new trial. The petition for rehearing with suggestion for rehearing en banc was denied on February 7, 1992 (Pet. 1a-2a).

REASONS FOR DENYING THE WRIT

This Court may someday wish to decide the issue of whether the Civil Rights Act of 1991 is ever to be applied retroactively to cases that were pending when it was enacted. However, this case is a manifestly inappropriate vehicle. Here, the Tenth Circuit summarily rejected petitioner's claim without addressing the merits of the retroactivity issue.[1] Petitioner had not provided any

[1] Because the retroactivity argument was concededly presented to and rejected by the Tenth Circuit, it would be inappropriate to va-

explanation of how the application of the Civil Rights Act of 1991 could require reversal of the judgment against petitioner or a new trial. And it is plain that the new Act could not affect any of petitioner's claims. Further, if the Tenth Circuit had somehow intended a broader ruling, its decision does not conflict with the decision of any other court of appeals.

First, to raise a retroactivity claim, petitioner must do more than point to recently enacted legislation, say that it presents an interesting issue of retroactivity, and ask the court of appeals (or this Court) to consider that issue. She must show how the provisions of the Civil Rights Act of 1991, if applied to her case, would require a new trial. Her failure to do so itself provided ample basis for the denial of the petition for rehearing—and likewise provides ample basis for denying the Petition for Certiorari.

Second, it is plain that the retroactive application of the 1991 Act could have no effect on petitioner's claim. Petitioner tried this case on a theory of disparate treatment, with respect to both the Title VII claim and the ADEA claim. The 1991 Act does not change the burden or standard of proof in disparate treatment cases brought under Title VII or the ADEA, and the new Act has no effect on the holdings that petitioner's evidence of disparate treatment was insufficient. Indeed, the only provision of the new Act that addresses the ADEA relates to the statute of limitations, which was not at issue in this case. (Pet. 20h-21h).

The Civil Rights Act of 1991 does contain new provisions governing the burden of proof in Title VII cases

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cate and remand to the court of appeals—as this Court has done in cases where the final decision of the court of appeals was entered before the Act was passed or where the court of appeals otherwise had no opportunity to consider the retroactivity issue. *Hicks* v. *Brown Group, Inc.*, No. 91-1116 (March 2, 1992); *Holland* v. *First Virginia Banks, Inc.*, No. 91-974 (Feb. 24, 1992); *Gersman* v. *Group Health Assn.*, No. 91-724 (Jan. 27, 1992).

based on a theory of disparate impact (Pet. 10h-11h). But those changes are irrelevant to this case because petitioner introduced no evidence of disparate impact. Petitioner had attempted to introduce such evidence in support of her *age discrimination* claims by attempting to call, as her final witness, an expert who was to present statistical information. However, the district court excluded this testimony on the ground that no prior evidence of disparate impact had been presented by petitioner and that there thus was no foundation in the record for her "expert's" opinion testimony. *See* Tr., Vol. III, pp. 366-68.[2]

There is nothing in the new Act that affects this holding, and the same outcome would have been reached if the case had been tried under the provisions of the new Act. As amended, Title VII still requires that petitioner prove "that respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," and the 1991 Act does not alter the burden of proof for disparate impact claims under the ADEA at all. (Pet. 10h). In short, petitioner's failure to present any evidence of any disparate impact would not be cured by anything contained in the Civil Rights Act of 1991.

Finally, even if the provisions of the Civil Rights Act of 1991 did bear on the issues presented in this case, this Court's review would not be warranted. Only one court of appeals—the Sixth Circuit—has reached the question whether the 1991 Act should apply to cases commenced before the effective date of the Act. That court, consistent with the action of the Tenth Circuit here, concluded that the Act should not be applied retroactively. *Vogel*

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[2] The district court specifically found that the particular employment practice identified by the expert, known as a Management Incentive Pay Plan, not only had no application to petitioner, but operated on the basis of inverse seniority and thus could not be offered as evidence of age discrimination. *Id.* The proposed statistical evidence did not address the claim of sex discrimination.

v. *City of Cincinnati*, No. 91-3474 (6th Cir. March 13, 1992). Both the Equal Employment Opportunity Commission and the Department of Justice have taken the same position. *See* 1992 *Daily Labor Report* (BNA) No. 2, D-1–D-3 (Jan. 2, 1992) (EEOC); 1991 *Daily Labor Report* (BNA) (Dec. 4, 1991) (Department of Justice). Thus, there is now no conflict among the courts of appeals on the retroactivity question or any other reason that would require this Court's review of the issue at this time.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Petitioner likewise provides no argument that would support her request that this Court review the propriety of the district court's discovery and evidentiary rulings. (Pet. i). Those rulings, which were fully considered and affirmed by the court of appeals (Pet. 3b-5b), raise no question of general significance that would warrant this Court's review.